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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/074,496	05/07/1998	JAMES R. ALBRITTON	091078.0554	2329

7590 09/03/2009  
BAKER AND BOTTS  
2001 ROSS AVENUE  
DALLAS, TX 752012980

EXAMINER
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FERGUSON, MICHAEL P

ART UNIT	PAPER NUMBER
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3679

MAIL DATE	DELIVERY MODE
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09/03/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 09/074,496	<b>Applicant(s)</b> ALBRITTON, JAMES R.	
	<b>Examiner</b> MICHAEL P. FERGUSON	<b>Art Unit</b> 3679	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 17 June 2009.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 37 and 40 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 37 and 40 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 17 June 2009 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## DETAILED ACTION

### *Claim Rejections - 35 USC § 102*

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 37 and 40 are rejected under 35 U.S.C. 102(b) as being anticipated by Wilcox (US 4,183,695).

As to claim 37, Wilcox discloses a breakaway guardrail post capable of use with highway crash control systems comprising:

an upper post member **24,26** having a weak impact axis and a strong impact axis;

a lower post member **12** disposed beneath and spaced apart from the upper post member (pole **12** is set up to mark or indicate something; and thus constitutes a post, as is consistent with the definition provided by Applicant);

a connecting joint member **30,32** having a first end and a second end, the first end of the joint member connected at the first end by a first fastener **40,42** to the upper post member and connected at the second end by an attachment to the lower post member (joint member **30,32** is connected by a welded attachment to lower post member **12**; column 1 lines 62-65), the first fastener having a first failure strength less than a second failure strength of the attachment;

the first fastener having a first connector **40** having a first failure strength and a second connector **42** having a second failure strength; and

the first failure strength of the first connector greater than the second failure strength of the second connector such that upon an impact force being applied along the weak impact axis, the second connector fails and the upper post member rotates about the first connector (Figures 1-6).

As to claim 40, Wilcox discloses a breakaway guardrail post capable of use with highway crash control systems comprising:

an upper post member **24,26** having a weak impact axis and a strong impact axis;

a lower post member **12** disposed beneath and spaced apart from the upper post member (pole **12** is set up to mark or indicate something; and thus constitutes a post, as is consistent with the definition provided by Applicant);

a connecting joint member **30,32** having a first end and a second end, the first end of the joint member connected at the first end by a first fastener **40,42** to the upper post member and connected at the second end by a second fastener to the lower post member (Joint member **30,32** is connected by a weld to lower post member **12**; column 1 lines 62-65. Such weld constitutes a fastener as is consistent with the Board of Patent Appeals and Interferences' interpretation of the term "fastener" within the BPAI decision dated March 23, 2007.), the first fastener having a first failure strength less than a second failure strength of the second fastener;

the first fastener having a first connector **40** having a first failure strength and a second connector **42** having a second failure strength; and

the first failure strength of the first connector greater than the second failure strength of the second connector such that upon an impact force being applied along the weak impact axis, the second connector fails and the upper post member rotates about the first connector (Figures 1-6).

### ***Response to Arguments***

3. Applicant's arguments filed June 17, 2009 have been fully considered but they are not persuasive.

As to claims 37 and 40, Attorney argues that:

Wilcox does not disclose a breakaway guardrail post comprising a lower *post member* disposed beneath and spaced apart from the upper post member.

Examiner disagrees. As to claims 37 and 40, Wilcox discloses a breakaway guardrail post comprising a lower post member **12** disposed beneath and spaced apart from the upper post member **24,26** (pole **12** is set up to mark or indicate something; and thus constitutes a post, as is consistent with the definition provided by Applicant; Figure 1).

### ***Conclusion***

4. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within

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TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MICHAEL P. FERGUSON whose telephone number is (571)272-7081. The examiner can normally be reached on M-F (6:30am-3:00pm).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Daniel P. Stodola can be reached on (571)272-7087. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

MPF  
08/31/09

/Michael P. Ferguson/  
Primary Examiner, Art Unit 3679